COURT OF APPEAL FOR ONTARIO

CITATION: Bazargani v. Mizael, 2015 ONCA 517
DATE: 20150708
DOCKET: C60280

Doherty, Pepall and Huscroft JJ.A.

BETWEEN

Ida Bazargani

Applicant
(Appellant in Appeal)

and

Ryan Mizael

Respondent
(Respondent in Appeal)

Sourena Sarbazevatan, for the appellant

James S. Marks, for the respondent

Heard: June 29, 2015

On appeal from the order of Justice J. Patrick Moore of the Superior Court of Justice, dated March 19, 2015.

By the Court:

Nature of Appeal

[1] The appellant mother appeals from the order of the application judge in which, applying Article 12 of the *Hague Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983, No. 35, he ordered that the

parties' four year old child be returned to Australia. The child was to reside with the appellant but be in the parties' joint custody pending further order of an Australian court.

[2] At the end of oral argument, the court dismissed the appeal, subject to one variation in the order below, with reasons to follow. These are those reasons.

[3] The appeal turns on the application of Articles 12 and 13 of the *Hague Convention*, the relevant portions of which state:

> **Article 12**
>
> Where a child has been wrongfully removed or retained … and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> **Article 13**
>
> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Background

[4] The parties married in Iran in 2004 and moved to Australia in 2006. Their child was born on August 17, 2010. In June 2012, the appellant was diagnosed with an anaphylaxis condition. Although no medical opinion was before the application judge, the appellant asserted that this condition was brought on by stress caused by her husband. She expressed a desire to travel to her parents' home in Toronto to convalesce. The respondent agreed that their child would travel with her.

[5] The appellant and the child left Australia on August 27, 2012. The appellant left her personal belongings behind in the parties' home, which was registered in the appellant's name. She did not quit her job, apply for a divorce or custody in Australia, or for immigration status in Canada. She did not otherwise indicate a settled intention to move permanently.

[6] For his part, after the appellant and the child had departed, the respondent never abandoned his parental rights. He also supported the appellant financially and communicated with her and the child and repeatedly sought to visit them.

[7] Approximately eight months after she left Australia, the appellant sent a custody agreement, which had been drafted by an Australian lawyer, to a friend in Australia. The agreement provided that the appellant would enjoy sole custody of the child and would also have the unrestricted right to choose the child's residence. The agreement made no mention of access, separation, or divorce. The appellant asked her friend to arrange for the respondent to sign the agreement and to encourage him not to consult with a lawyer. She wrote: "[D]on't let him know why you are meeting with him in advance so that he just signs the document."

[8] Without obtaining any legal advice, the respondent signed the agreement. He amended it by hand so as to limit the term of the agreement to 10 years. He testified that he signed the agreement despite his reservations so as to prove to the appellant that he was truly concerned about her health and that of their family and because he wanted to see and be reunited with his daughter and his wife. As found by the application judge, the respondent believed that signing the agreement would speed the return of the child to Australia. The respondent

testified that he never would have signed the agreement if he knew that the appellant was not going to come back to Australia.

[9] In August 2013, the appellant instituted property division proceedings but her lawyer advised the respondent that she still intended to return to Australia with the child. In September 2013, the appellant enrolled in a post-secondary education programme in Toronto at the respondent's expense. Realizing that the appellant was not about to bring the child back to Australia, the respondent demanded the child's return. The appellant refused and in October 2013, she brought an application for divorce in the Superior Court. The respondent responded with a *Hague Convention* application in Australia followed by one in the Superior Court in June 2013.

Application Judge's Decision

[10] The application judge found that the child had been wrongfully retained in Toronto by her mother since the Fall of 2013 when the respondent demanded the child's return to Australia and the appellant refused. The application judge rejected the appellant's argument that she and the child had been habitually resident in Ontario with a settled intent to stay since August 2012 and that her intention to relocate should have been clear to the respondent. The application judge stated that a person cannot unilaterally establish a new habitual residence by wrongfully removing a child. He did not accept the appellant's submission that

the respondent had abandoned his rights to custody or had consented or acquiesced to the child's retention by the appellant when he signed the custody agreement. The application judge considered the custody agreement a "red herring" because s. 58 of the *Family Law Act*, R.S.O. c. F.3 provides that the court will not enforce such a contract if made while the parties were married. At best, the agreement afforded some evidence of consent. However, the respondent continued to support the appellant and the child financially and demonstrated a determination to maintain his parental rights.

[11] The application judge concluded that the child should be returned to Australia. Article 12 of the *Hague Convention* required the return of a wrongfully retained child and no Article 13 defences were applicable. It would be for the court in Australia to determine whether the agreement constituted a binding agreement for the purposes of custody, access, residence and all other incidents of parenting. He also noted that the respondent's undertakings were intended to ease the strain on the child of a return to Australia and were "sensitive to the transition concerns and generous of [the respondent's] time and financial contributions to the transition process".

Standard of Review

[12] Over the course of a three day trial, the application judge heard testimony from 8 witnesses and reviewed the written record containing 20 affidavits. As this court stated in *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, at para. 88,

> A *Hague* application judge's decision attracts considerable deference from this court … [A]ppellate review of a Hague decision is not a hearing *de novo* or an invitation to relitigate the matters determined on the application: *Katsigiannis* at para. 30; *Korutowska-Wooff v. Wooff*, [2004] O.J. No. 3256, 242 D.L.R. (4th) 385 (C.A.), at para. 10. But, the deference usually accorded to a *Hague* ruling is displaced where the *Hague* application judge applied the wrong legal principles or made unreasonable findings of fact: see *Jabbaz v. Mouammar*, [2003] O.J. No. 1616, 171 O.A.C. 102 (C.A.), at para. 36; *Katsigiannis*, at para. 31.

Grounds of Appeal

[13] The appellant advances three grounds of appeal.

(a) Article 13(a) Consent

[14] First, the appellant submits that the application judge erred in concluding that the respondent had not consented or acquiesced to the child remaining in Canada as described in Article 13(a) of the *Hague Convention*. In this regard, she particularly relies on the custody agreement.

[15] We disagree.

[16] There was ample evidence in the record to support the application judge's conclusion that the custody agreement did not constitute consent or acquiescence by the respondent. Prior to execution of the custody agreement, the respondent was never told that the appellant intended to separate, divorce or remain with their child in Canada. In addition, the circumstances surrounding the execution of the custody agreement, including the correspondence to the appellant's friend, support the absence of any such communication. On the record before him, it was open for the application judge to find that the respondent executed the agreement to hasten the return of his wife and child to Australia.

(b) Article 13(b) Grave Risk of Harm

[17] Secondly, the appellant submits that the application judge erred in not considering the "grave risk" of harm defence in Article 13(b) of the *Hague Convention*.

[18] Article 13(b) was not relied upon by the appellant before the application judge. This is evident both from an exchange between her counsel and the application judge during the course of the trial and from the parties' written submissions filed before the application judge.

[19] Having considered Article 13(a), the application judge noted at paragraph 41 of his reasons that, while other defences may arise under the *Hague*

Convention, none had been raised on the application and “the facts do not support their application here in any event.”

[20] The threshold under Article 13(b) is high. Before the application judge, there was conflicting evidence on the allegations of abuse. No medical evidence was filed or called. It is not proposed that the parties live together and the appellant has been content to have the respondent exercise access to the child albeit on a supervised basis. As decided by the application judge, the issues of custody and access are properly addressed in Australia. On the record before him, we see no error in this determination.

(c) Article 12 Settled in Environment

[21] Thirdly, the appellant submits that the application judge erred in not considering the “settled in environment” defence in Article 12 of the *Hague Convention*.

[22] The application judge determined that the date of the child’s wrongful retention was the Fall of 2013 and the respondent commenced his application in June, 2014. Accordingly, the respondent brought his application within one year of the child’s wrongful retention and the "settled in environment” defence in Article 12 was unavailable to the appellant. This ground of appeal must also fail.

Disposition

[23] As indicated at the end of oral argument, the appeal is dismissed. Paragraph 11 of the March 19, 2015 order of the application judge is varied to substitute the expiry date of July 16, 2015 with Monday, August 17, 2015. The appellant shall pay the respondent his costs fixed in the amount of $8,000 inclusive of disbursement and applicable taxes. The motion brought by the respondent for access on June 29 and June 30, 2015 was withdrawn by the respondent in light of the agreement of the parties.

Released:

"DD" "Doherty J.A."
"JUL -8 2015" "S.E. Pepall J.A."
"Grant Huscroft J.A."